UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CURTIS A. MOORE, Appellant, v. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Agency.	DOCKET NUMBER CB7121920025V1 DATE: NOV 02 1992

Dale R. Jacobson, American Federation of Government Employees, Local 2782, Suitland, Maryland, for the appellant.

Bruce I. Waxman, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has requested review of an arbitration decision, issued on January 16, 1992, that denied his grievance of the agency's removal action. The agency has moved to dismiss the request as untimely. For the reasons discussed below, we DENY the appellant's request for review and the agency's motion to dismiss.

BACKGROUND

The agency removed the appellant from his position as a Geographic Technician, GS-5, for unacceptable performance. The appellant grieved his removal in accordance with the collective bargaining agreement. Ultimately, an arbitrator denied the grievance, finding that the agency had requisite cause to remove the grievant. *See* Request for Review (RFR) File, Tab 1 (Arbitrator's Opinion) at 21. The arbitrator rejected the appellant's handicap discrimination claim based on a learning disability, finding that the agency met its legal obligations to the appellant, including any requirement of reasonable accommodation, that "the grievant did not have the basic ability to perform the Geographic Technician GS-5 job," and that he failed to show that he "was qualified for any job in issue." *Id.* at 19-20 n.12. In this connection, the arbitrator also found that "[t]o the end of the arbitration hearing, the only medical evidence . . . [wa]s a five page report by psychologist Sumner, perhaps 80-90% 'sanitized'; i.e., blanked out," and that, even this report had not been made available to the agency's personnel official and legal counsel until the hearing. *Id.* at 8.

On July 11, 1992, the appellant filed a request that the Board review the arbitrator's decision, alleging that the agency did not accommodate his handicap. *See* RFR File, Tab 1 at 6-7. In response to the Board's acknowledgment order stating that the request appeared to be untimely filed, the appellant submitted an affidavit regarding the timeliness

issue. See RER File, Tab 3. To support its motion to dismiss the request as untimely, the agency has filed a statement signed under penalty of perjury. See RFR File, Tab 5.

ANALYSIS

The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) where the subject matter of the grievance is one over which the Board has jurisdiction, the grievant alleges discrimination as stated in 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. See *Lisboa v. Department of the Air Force*, 46 M.S.P.R. 6, 7-8 (1990). Each of these conditions is satisfied in the present case: The Board has jurisdiction over a removal action under 5 U.S.C. §§ 7512 and 7513(d); the appellant alleged handicap discrimination in violation of 5 U.S.C. § 2302(b)(1)(d); and a final decision was issued denying the appellant's grievance.

The appellant's request for review is considered timely filed with the Board, since it was timely filed with EEOC.

Under 5 C.F.R. § 1201.154(d), requests for review of arbitration awards have to be filed within 25 days of the issuance of an arbitrator's decision. The appellant filed his request for review on July 11, 1992, almost 6 months after the issuance of the arbitrator's decision. That request, therefore, was untimely. The Board, however, will waive its time limitations under 5 U.S.C. § 7702(f) in cases where a mixed appeal (involving both an appealable matter and a claim

of discrimination) was timely, but mistakenly, filed with an agency that lacks jurisdiction to hear the appeal. *See Rupp v. Department of Health and Human Services*, 51 M.S.P.R. 456, 463 (1991).

In his affidavit, the appellant states the following: (1) On January 25, 1992, he received a copy of the arbitration decision from his union representative; (2) on February 7, 1992, he received a second copy of the arbitration decision, with an attached letter from the agency's Labor Relations Department providing him with appeal rights; (3) in this letter he was erroneously informed that he could file an appeal with the Equal Employment Opportunity Commission (EEOC), the U.S. District Court, or the Merit Systems Protection Board; (4) he chose to file with EEOC and submitted his appeal there on February 12, 1992;[1] (5) on June 17, 1992, the EEOC issued a decision dismissing the appeal without prejudice, based on a finding that the appellant's

---

[1] We find that the notice of appeal was filed within the time limit of 29 C.F.R. § 1613.233(a) and reiterated in the agency's letter, *i.e.*, 20 days of receipt of an arbitration decision. Thus, the appeal was timely filed with EEOC, and the appellant therefore meets the requirements for waiver set forth at 5 U.S.C. § 7702(f). We note, further, that the appeal was filed with the EEOC within 5 days from the appellant's receipt of the copy of the arbitration decision that provided his first notice of appeal rights, and that it appears that the EEOC accepted the appeal as timely filed. *See Rupp v. Department of Health and Human Services* at 463. *Cf. Van Meter v. Department of Health and Human Services*, 40 M.S.P.R. 468, 471-72 (1989) (the Board found no good cause for waiving deadline where the appellant filed an untimely appeal with EEOC and the evidence did not show that she was not informed of appeal rights), *aff'd*, 889 F.2d 1099 (Fed. Cir. 1989) (Table).

right of appeal was to the Board rather than to the EEOC; (6) on July 11, 1992, 24 days from the issuance of the EEOC decision, he filed an appeal with the MSPB.

We find that the appellant did not make a conscious election by timely filing his request with the EEOC rather than the Board. A "conscious election" may include the filing of a mixed case with the EEOC rather than the Board where actual notice has been given by the arbitrator or administrative judge to the appellant that the appeal must be filed with the Board, or the record reflects that the appellant knew that the appeal had to be filed with the Board. *See Macias v. Department of the Air Force*, MSPB Docket No. DA0752920074-I-1, slip op. at 4 (June 11, 1992); *Marenus v. Department of Health and Human Services*, 39 M.S.P.R. 498, 503 (1989). We find that the evidence does not support a finding that the appellant received actual notice or was aware that he should file his appeal with the Board.

The agency contends that the appellant made a conscious election to pursue his remedies with EEOC after March 26, 1992,[2] when the agency representative informed the appellant's representative that the proper forum for the appeal was the Board, despite the agency's misleading notice, and that it

---

[2] We note that the agency's motion also states that the appellant's representative was notified on March 16, 1992. *See* RFR, Tab 5 at 11. However, this appears to be a typographical error. *See* RFR, Tab 5 at 6, and affidavit of Bruce Waxman, agency representative.

would oppose the EEOC appeal on this basis.[3] The agency claims that a "conscious election" occurred then because the appellant "knowingly" elected not to withdraw his appeal with EEOC and file with the Board. By incorrectly advising the appellant that he had a right to appeal to the EEOC, the agency misinformed the appellant, in writing, regarding his appeal rights. Thus, we find that in these circumstances, especially given the adversarial nature of the EEOC proceedings, it was reasonable for the appellant's representative not to believe the information received in a phone call from the agency counsel and to await EEOC's decision. Nor was the motion to dismiss, filed with EEOC by the agency, sufficiently specific to have required him to adopt the agency's new position at that time. *Cf. Rupp*, 51 M.S.P.R. at 463 (appellant did not act unreasonably in appealing EEOC decision to court rather than initiating appeal with Board, nor was there evidence that appellant became aware that her appeal should have been filed with Board while court appeal was pending). Accordingly, we find that the appellant did not make a "conscious election" to pursue his appeal with EEOC rather than filing an appeal with the Board. *Cf. McBurney v. Office of Personnel Management*, 39 M.S.P.R. 126,

---

[3] The agency also contends that, despite the appellant receiving agency misinformation regarding his appeal rights, he was provided with a copy of the Board's regulations at the time of his removal and thus should have realized that he had 25 days to file with the Board. *See* Motion to Dismiss at 10. However, the record is devoid of evidence to support the agency's assertion.

129 (1988) (where the Board found that an agency is required to provide information that is not only correct in nature but adequate in scope to allow an employee to make an informed decision).

Finally, we find that the appellant used due diligence when he filed his request with the Board within 25 days of the issuance of the EEOC decision dismissing his appeal for lack of jurisdiction and informing him that the correct appeal avenue was to the Board.[4] *Cf.* 5 C.F.R. § 1201.154(d); *Rupp*, 51 M.S.P.R. at 464 (the Board found good cause for waiving the filing deadline where the appellant filed her request for review 17 days from the date that she received EEOC's decision). Accordingly, we find that the appellant has established good cause for his untimely filing. *See Shiflett v. U.S. Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988); *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

The appellant's request for review does not provide a basis for review of the arbitration decision.

The scope of the Board's review of arbitration decisions is limited. Unlike initial decisions subject to Board review

[4] The Board set forth the criteria for determining when good cause has been shown for purposes of waiving the time limit for filing a petition for appeal with the Board in *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). These criteria are also applicable to untimely filed requests for review under 5 C.F.R. § 1201.154(b). *See Donahue v. Department of the Air Force*, 47 M.S.P.R. 20, 22, *aff'd*, 944 F.2d 913 (Fed. Cir. 1991) (Table).

under 5 C.F.R, § 1201.115, arbitration decisions are entitled to deference, and will be modified or set aside only where the arbitrator has erred as a matter of law in interpreting civil service law, rules, or regulation. *See Robinson v. Department of Health & Human Services*, 30 M.S.P.R. 389, 395-96, *reconsideration denied*, 31 M.S.P.R. 479 (1986). The arbitrator's finding that the appellant did not prove his handicap discrimination claim is a factual determination entitled to deference, unless the arbitrator erred in his legal analysis, e.g., by misallocating burdens of proof or employing the wrong analytical framework. *See Lisboa v. Department of the Air Force*, 46 M.S.P.R. at 8.

In this case, the arbitrator found that the appellant's learning disability was a "handicapping condition" but found, in effect, that he was not a "qualified handicapped person" because there was no showing that he could perform the "essential functions" of his position or any other job at issue "with or without accommodation." *See* RFR File, Tab 1 (Arbitrator's Opinion) at 13, 19-20 n.12. Moreover, the arbitrator found that the agency had offered the appellant a lower-graded, GS-4 position, which he rejected. *See id.* at 19. Accordingly, the arbitrator properly found that the appellant had not shown handicap discrimination. *See Wilson v. Immigration & Naturalization Service*, MSPB Docket No. CB7121920016V1, slip op. at 5-6 (Aug. 10, 1992).

In support of his assertion that his removal resulted from the agency's failure to accommodate his handicap, the

appellant makes three objections to the arbitrator's decision: (1) The arbitrator ignored the facts in finding that the appellant did not provide sufficient medical documentation to the agency, RFR File, Tab 1 at 6-7; (2) the arbitrator overlooked the fact that the agency did not fully seek to accommodate his handicap, *id.* at 7-8; and (3) the accommodation of the appellant's condition would not have caused the agency undue hardship, *id.* at 8. Since these objections relate only to the arbitrator's factual findings and conclusions, which are entitled to deference, and do not demonstrate legal error, we find that they provide no basis to set aside or modify his decision. *See Lisboa v. Department of the Air Force*, 46 M.S.P.R. at 8; *Johnson v. Department of the Army*, 31 M.S.P.R. 383, 385 (1986).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal.

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not t seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the

court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.